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Fourth Amendment Review 2021

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Ekow N. Yankah*

When it comes to policing, the U.S. Supreme Court too often plays the role of the garish sun.[1] Scholars counsel that policing is the quintessential local activity, often repeating that the United States has up to 18,000 local police forces, and if one wants to change policing, the place to look is your police chief, sheriff, or mayor.[2] Yet despite our own warnings, we cannot help staring towards that Washingtonian marbled temple, to divine the shape of policing to come. If the Supreme Court cannot readily modify policing in each city and hamlet, it is unique in its ability to establish binding nationwide Fourth Amendment rulings and set minimum guarantees on the limits of policing power. And though we know it to be ridiculous, we seek some magic bullet solution to cure the turmoil of contemporary debates and protests surrounding policing.

If our impulse is to look to the Court for answers, this Term revealed no revolutionary solution but rather the dim outlines of our own reflection. As Court watchers occasionally remind, Supreme Court justices read *The New York Times* too. Whatever their newspaper of choice, this Term's policing cases, if not monumental in nature, reflect a Court that seems affected by the national reckoning with police power and police brutality. To be sure, there is no grand movement or iconic case engaging with the numerous brutal police killings, particularly of Black men. Direct engagement is seen only in innuendo, in dissenting opinions at that. But one senses a Court touched by the nationwide call to attend to the way policing interacts with policed communities.

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[1] *See* William Shakespeare, Romeo and Juliet act 3, sc. 2 ("Give me my Romeo. And when I shall die,/Take him and cut him out in little stars,/And he will make the face of heaven so fine/That all the world will be in love with night/And pay no worship to the garish sun.").

[2] Leandra Bernstein, *America has 18,000 Police Agencies, No National Standards; Experts Say That is a Problem*, WJLA (June 9, 2020).

Perhaps I am reading a Supreme Court Rorschach test, seeing the things in the cases that matter most to me. After all, one of the three major Fourth Amendment rulings of this Term actually expanded the power of the police, though in a particularized context, and the other two offered only mild constraints on policing powers. A politicized, abolitionist Court or Fourth Amendment revolution this is not. Yet, against a generation of largely (if not universally) expanding policing power, one can search this Term's cases for a bulwark against further free reign to police in giving chase and using violence to seize ordinary citizens.

I. *United States v. Cooley*: Who Gets to Police Whom?

Begin first with the counter example. On June 1, 2021, the Supreme Court decided *United States v. Cooley*.[3] The defendant, James Cooley, was in the Crow Indian Reservation in Montana when tribal police officer James Saylor noticed his truck idling by the side of the road. While questioning Cooley to determine if he needed help, Saylor noticed Cooley's bloodshot eyes and suspected Cooley was intoxicated. More pressingly, Saylor saw two semiautomatic rifles in Cooley's front seat. The situation reportedly grew tense; Saylor drew his weapon, detained Cooley, and called for backup.[4] During this process, Saylor also saw drug paraphernalia, plastic bags, and a glass pipe associated with methamphetamine use. The drug paraphernalia was seized as it was in plain sight, and Cooley was questioned by federal and local officers and eventually indicted on gun and drug charges.[5]

Even given the tense arrest, the surface facts of the arrest hardly seem remarkable. An intoxicated driver with weapons and drugs is hardly unique. But what made this case sufficiently important for the Supreme Court was the location of the arrest and the people involved. Cooley, a non-Indian, was traveling on Indian land when he was arrested by Officer Saylor, a tribal police officer, bringing to the fore a unique facet of American policing law regarding racial minorities.[6]

[3] United States v. Cooley, 141 S. Ct. 1638 (2021).
[4] *Id*. at 1639; Elizabeth Reese, *Affirmation of Inherent Tribal Power to Police Blurs Civil and Criminal Indian Law Tests*, SCOTUSblog (June 7, 2021).
[5] *Cooley*, 141 S. Ct. at 1639.
[6] *See id*.

Indian tribal law occupies a unique space in American law. Obviously, Indian nations were once independent. After the colonization, conquering, and genocide of the Native Americans, the majority of Native Americans were packed into reservation lands. Thus, Indian nations became a hybrid creature: domestic land that was granted wide sovereign powers to govern its own affairs but with those powers limited and superseded by the laws of the United States. This has resulted in a complex and understudied interplay of federal, state, and tribal law.[7] Particularly, pertaining to criminal law and policing, the right of Indian territories to enforce their own laws and police their own customs has posed an enduring question.[8]

Picking up on earlier law that disabled tribal authorities from regulating hunting and fishing, Cooley argued that as a non-Indian, tribal officer Saylor lacked the authority to search and detain him. Rather, he argued that once tribal officers realized he was a non-Indian, they were obligated to release him unless they had actively witnessed him committing a crime. Cooley further argued tribal officers should be required to ask a detainee whether they are Indian and only authorized to detain those who answer yes (or presumably were otherwise reasonably ascertained as Indian).

The Supreme Court, succinctly reviewing the retained inherent sovereign authorities of tribal powers, unanimously rejected Cooley's argument. The Court was unpersuaded that tribal powers derived merely from the power to keep non-Indians from entering reservation

[7] For more on this history and the role the U.S. Supreme Court has played, see Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, Am. Bar Assoc. (Oct. 1, 2014).

[8] A famous example, illustrating the interplay between state employment law, criminal law, and tribal law and norms is *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990). There, two defendants, Smith and Black, were counselors at a private drug rehabilitation clinic. They were fired for ingesting peyote, a powerful and outlawed hallucinogen, which they took as a part of a religious ceremony at the Native American Church. They were both subsequently denied unemployment benefits. Both sued, arguing that denying them benefits premised on work-related misconduct violated their rights under the Free Exercise Clause of the U.S. Constitution. After a circuitous route, the Court eventually found that though employment benefits could not be conditioned on one surrendering their religious practices, one could be legally sanctioned for behavior in violation of justifiable criminal laws. *Id*. at 779–80.

lands.[9] Instead, the Court determined the case was straight-forwardly settled by its prior precedent. In earlier language, the Supreme Court held that whatever the restraints on their legal authority, tribal authorities "retain[ed] inherent power to exercise civil authority over the conduct of non-Indians . . . within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[10] The Court thought it obvious that detaining persons, Indian or not, suspected of intoxicated driving fit this reasoning "like a glove."[11]

Ultimately then, the Supreme Court expanded the power of the police throughout bounded regions of the country. It firmly dismissed arguments that the police establish the ethnic identity of a person before asserting authority.[12] Given the crime at bar, an intoxicated man with semi-automatic weapons, it would have been surprising, circuit court ruling notwithstanding, had the Court ruled otherwise. It is natural to read this outcome as the Court continuing to expand police power.

But another reading of this case admits interesting nuance. Obviously, Supreme Court cases typically eschew any explicit allegiances to political positions or stakes in sweeping controversies. But among the sociological, legal, and everyday political accusations in modern policing has been the charge that minority communities are both overpoliced and under-protected. This phrase captures the phenomenon that minority communities are often the focus of concentrated policing, yet that policing is often not viewed as serving the interests of the patrolled community. At its heart, it describes the all-too-common feeling in many communities that the police are something like an occupying army, serving wealthy, powerful, and often White constituencies elsewhere.

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[9] *Cooley*, 141 S. Ct. at 1643. As mentioned, the interplay between inherent tribal authority and the powers of the United States and questions as to whether *Cooley* presented an opportunity for the Court to trim back those powers is complex and beyond both my expertise and purpose. *See* Reese, *supra* note 4, for an excellent starting point for this wider inquiry.

[10] Montana v. United States, 450 U.S. 544, 566 (1981).

[11] *Cooley*, 141 S. Ct. at 1643.

[12] Dismissing such invitations for the police to cabin their authority by first seeking a sort of jurisdictional authority is independently interesting. It recalls the analogous invitation for police to inform citizens of their right to withhold consent when asking to conduct searches. A generation ago, the Supreme Court rejected that requirement as well. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

While the Supreme Court denies it is a player in this political debate, there is a clear sense in which *Cooley* puts this question unavoidably in front of the Court. Ultimately, *Cooley* asks not just what is policed but who is permitted to do that policing. More specifically, *Cooley* asks if a minority community is permitted to take control of its own policing, by its own members, for its own good, even to the point of enforcing laws on non-Indians. This, of course, does not mean that tribal policing is unproblematic; policing in Black-majority cities by Black policemen, as an analogy, does not magically cure the racial tensions in policing.[13] Still, it is hard to ignore that the Court's ruling explicitly rejects a position that would have further neutered a semi-sovereign nation, housing arguably America's most vulnerable racial minority, from policing its own streets from non-Indians. In this sense, the result of *Cooley* was not only to expand policing power but also to place greater control of that policing in the hands of the racial minority being policed.

II. *Lange v. California*: What Are the Limits to Hot Pursuit?

Perhaps the most consequential of this Term's policing cases may be the one with the most seemingly innocuous facts, *Lange v. California*.[14] Indeed, it is precisely because the facts are so quotidian that the ruling holds so much meaning. In October 2016, Arthur Lange was "rolling down the street,"[15] to wit, Lange was driving while playing loud music, with his windows down and honking his horn. Surprising perhaps no one but himself, Lange caught the attention of a California highway patrol officer who, believing Lange to be in violation of at least California misdemeanor noise statutes, signaled for Lange to pull over.[16]

By then Lange, who claimed to not have seen the flashing lights, was only one hundred feet from his home and so pulled into his garage. The officer followed Lange into his garage to question him. Believing Lange to be drunk, the officer put Lange through a field sobriety test. Lange did

[13] *See* James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America (2017).
[14] Lange v. California, 141 S. Ct. 2011 (2021).
[15] Snoop Dogg, Gin and Juice (Death Row/Interscope Records, Inc. 1993). This represents a vague attempt to be whimsical. I am sad to inform the reader your author is not particularly "hip." And, of course, drunk driving is not to be taken lightly. Sigh…
[16] *Lange*, 141 S. Ct. at 2013.

not pass, surely because his blood-alcohol level was later revealed to be over three times the legal limit.

The legal issue at the center of the case focused on the moment the officer entered Lange's garage. There may be no more repeated incantation in Fourth Amendment jurisprudence than the declaration that the home is the heart of the protection against (literally) unwarranted police intrusion.[17] Famously, even when the police have probable cause to believe a murder suspect is home, with lights on and music playing, police entry without a warrant is unauthorized and may lead to suppression of any recovered evidence.[18]

To the dismay of generations of criminal-procedure students, though the home is held up as sacrosanct, there are myriad exceptions to the warrant requirement. The most prominent among these are grouped into "exigent circumstances." The archetypal exigent circumstance, at issue in *Lange*, is "hot pursuit."[19] For obvious reasons, if police are chasing a felony suspect, they are not obligated to stop helplessly at the door of the home. They may enter the home to capture the suspect so long as they were in hot pursuit. Any other rule risks turning policing into an elaborate game of tag, with one's home acting as "base."

Were Lange suspected of a felony, the legal analysis would have been well-settled by precedent. Whether or not the facts on the ground show the police are in hot pursuit will often be controversial. In one case cited by the Court, police pulled up to a home, guns drawn, finding a female suspect with one foot in and one foot out of her home.[20] Whether her fleeing into her home in fact constituted hot pursuit was hotly debated. But if the police are in hot pursuit of a felon, the law is clear they may enter a home without a warrant. Remember, however, that when California Highway Patrol followed Lange into his home, the officer only had evidence that Lange had violated a misdemeanor, the willful failure to comply with a lawful order by a police officer (and perhaps a noise infraction).

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[17] Intrusions are governed by the warrant requirement when they are fundamentally related to policing and crime control. Non-crime-control police acts, such as a welfare check, are considered community caretaking and are not governed by the warrant requirement. Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

[18] Payton v. New York, 445 U.S. 573 (1980).

[19] *Lange*, 141 S. Ct. at 2016.

[20] U.S. v. Santana, 427 U.S. 38 (1976).

Given the constant invocations about the sanctity of the home, one might think the legal question would turn on whether a police officer can *ever* enter a home in hot pursuit of a misdemeanor offense. But that would be to sorely misread the vast default permissiveness of our national policing culture. Rather, the legal question put to the Court was whether the pursuit of a fleeing misdemeanor suspect always, i.e., categorically, permits the police to follow a suspect into a home. Put slightly differently, does hot pursuit by itself create an exigent circumstance, waiving the warrant requirement?

The Court unanimously rejected a categorical rule that would allow a categorical hot pursuit exigency in misdemeanor cases.[21] But the unanimous vote both belied a fairly modest view of the limitations on police and hid rather sharp disagreements between the majority and a separate opinion by Chief Justice John Roberts and Justice Samuel Alito that was a dissent in everything but name.

Even in rejecting the over-expansive proposal allowing warrantless entry in pursuit of misdemeanants, the majority made clear that a case-by-case analysis would often permit home entry when chasing a person who did not yield to police commands.[22] Police often must make quick decisions in rapidly changing and charged circumstances. A circumstance that initially appears to be a relatively minor legal issue may reveal unanticipated dangers. Additionally, the fact that a suspect fled may obviously charge the situation further. Hot pursuit of a suspect, whether a misdemeanant or not, may give rise to other classic exigencies, such as fear of harm to officers or bystanders, or the destruction of evidence. In short, there may be many reasons for the police to treat hot pursuit of a misdemeanant as an exigency requiring them to enter a home.

Nonetheless, the Court balked at a categorical permission to ignore the warrant requirement in what are, after all, minor infractions. First, the Court relied on a little-referenced thread in its Fourth Amendment jurisprudence that where there was no immediate danger, the severity of a crime has some effect on the license given police to execute a warrantless search. The supporting case, *Welsh v. Wisconsin*,[23] bore at

[21] *Lange*, 141 S. Ct. at 2016.
[22] *Id*. at 2021–22.
[23] Welsh v. Wisconsin, 466 U.S. 740 (1984).

least a passing resemblance to the facts of *Lange*. In *Welsh*, police officers, responding to a call about a drunk driver, tracked Welsh to his nearby home and entered without a warrant to investigate. In that case, the Supreme Court ruled that the police could not enter the home as an exigency for such a minor offense.[24]

Welsh differed in important ways from the facts of *Lange*. Most obviously, Welsh was already home in bed, thus removing the critical facet of hot pursuit.[25] But the point remained that the lack of urgency was a reason to restrain police from entering a home without a warrant. The same reasoning applied here. If true that a misdemeanor does not always rule out an urgent situation, surely the opposite conclusion, that any flight from any minor offense should permit an unrestricted police chase no matter the underlying issue, borders on the unbelievable. This insight was highlighted in the majority's historical survey of Fourth Amendment law, exploring the starkly different powers police had to enter a home in pursuit of a suspected felon versus those suspected of minor infractions. Ultimately, the majority ruled that police entry into a home in hot pursuit of a misdemeanant must turn on the totality of the circumstances.

The decision produced brief concurring opinions, including from Justice Clarence Thomas. Justice Thomas's double-pointed concurrence first contented that any rule prohibiting police from entering a home must carve out an exception for officers pursuing anyone fleeing even minor violence or breach of the peace. Secondly, Justice Thomas continued his long-held insistence that even if police violated the newly announced rule against misdemeanor home entries, the classic Fourth Amendment remedy of suppressing evidence should not be assumed.[26]

While the precise legal remedy for a violation would not seem critical in deciding the core of the case, Justice Thomas's shot across the

[24] *Id*. at 740–41. To be sure, the Court's view of how the weightiness of an offense effects police authorization under the Fourth Amendment is at least unclear. In contrast to its reasoning in *Welsh* and *Lange*, the Supreme Court rejected the idea that police arrests in the case of minor, "non-arrestable" crimes are Fourth Amendment violations. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). More recently, the suggestion that police power to electronically follow suspects by, for example, monitoring their cars for weeks on end, might turn on the seriousness of the suspected crime was dismissed as unheard of in its Fourth Amendment jurisprudence. U.S. v. Jones, 565 U.S. 400 (2012).

[25] *Compare Lange*, 141 S. Ct. at 2016, *with Welsh*, 466 U.S. at 740.

[26] *Lange*, 141 S. Ct. at 2026–28 (Thomas, J., concurring in part and concurring in the judgement).

bow is much more than a theoretical skirmish about how best to enforce an agreed-upon rule. Legal scholars have long recognized the difficulty of enforcing Fourth Amendment restrictions and further translating those restrictions into policing culture. As anyone who follows the pitched political battle surrounding qualified immunity in cases of police misconduct can attest, civil damages and other alternatives have shown little impact in altering policing behavior. To be frank, police behavior is often hard to alter even with the "sanction" of excluding evidence. Thus, Justice Thomas's insistence that the exclusionary rule ought not to be applied to curtail police violations of this rule threatens to neuter the rule at inception.

If Justice Thomas's additions would fatally weaken *Lange*'s holding, Chief Justice Roberts's separate opinion was all but aghast that the rule would apply except in the rarest of cases. In Chief Justice Roberts's view, Supreme Court precedent has already established that hot pursuit, without regard to the underlying offense, established the exigency required for warrantless home entry. He further blasted the majority's ruling as both dangerous for police officers and encouraging suspects to flee rather than obey police orders. In Chief Justice Roberts's view, the majority opinion does so only to impose the time-consuming formality of securing a warrant. Lastly, he warns that the majority ruling imposes uncertainty onto police officers who often do not (or cannot) know whether the facts in front of them amount to a misdemeanor or felony. The only remaining question was whether Lange's case was one of the rare instances in which warrantless entry ought not to be allowed despite the exigent circumstances.[27]

A one hundred-yard police "chase" of an obnoxious drunk, booming loud music, resulting in a unanimous opinion, hardly seems worthy of great note. But it is precisely the innocuous contours of the case that lend it such weight. While spectacular cases of violent felonies most readily capture our imagination, the overwhelming majority of police work concerns anything but. Police officers spend their days engaged in ordinary order maintenance: unruly drunken behavior, heated tempers and sudden fights, overly loud music, drug use, and vandalism. In short, the misdemeanor hallmarks of *Lange* are precisely the daily

[27] *Id*. at 2028–37 (Roberts, C.J., concurring in the judgment).

grist of policing work.[28] That is not yet to even mention the seemingly endlessly proliferating criminal laws, infractions, and vehicle regulations that mean that police have nearly limitless power to find misdemeanor criminal violations of any suspects they wish to investigate.

Further, it would be willfully blind to ignore the obvious racial implications of the ruling in *Lange*. If Lange's behavior was obviously attention grabbing, it remains true that generations of African-Americans, myself included, have internalized the unchecked power of the police to stop you for the crime of "driving while Black."[29] Nor does racist harassment disappear once Black and Hispanic citizens exit their cars. The recent nationwide political fights and lawsuits surrounding institutionalized "stop and frisk" regimes revealed stunning racially disproportionate frisks. There is every reason to believe that a rule categorically permitting police to chase citizens into homes in pursuit of any infraction, no matter how minor, would have the same effects.

In the real world, police choose whom to police at least as often as they are compelled to intervene. A categorical permission to pursue any misdemeanant would give police unchecked power to chase anyone, anywhere, without limitation. Chief Justice Roberts addresses this glaring issue only in passing, noting that earlier precedent prohibits police from purposefully generating an exigent circumstance in order to gain access to homes. But the cases mentioned in the majority opinion tell a very different story. In *Wardlow v. Illinois* a caravan of police, known as a "jump out" squad, descended on a high drug-trafficking area, scattering a number of people, and starting a police chase.[30] Similarly, in *California v. Hodari D*. police officers sent four or five panicked youths fleeing.[31] Nor should one be misled because those famous cases involved people ultimately captured with contraband. It is one of the standing truths about criminal procedure that highly visible cases typically involve the guilty. Those facing jail time are the ones with the incentive to litigate cases to the Supreme Court. As the stop-and-frisk litigation

[28] Issa Kolher-Hausmann, Misdemeanorland: Criminal Courts and Social Control in the Age of Broken Windows Policing (2018).

[29] Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 957 n.1 (1999); Charles R. Epp, Steven Maynard-Moody & Donald P. Haider-Markel, Pulled Over: How Police Stops Define Race and Citizenship (2014).

[30] Illinois v. Wardlow, 528 U.S. 119, 121–24 (2000).

[31] California v. Hodari D., 499 U.S. 621, 622 (1991).

reminds, countless instances of other innocents chased by the police typically disappear without record.

And as the majority's opinion illustrates, it takes little imagination to multiply the examples endlessly. People with mental disabilities may quickly retreat from the police. A teenager, driving without headlights, faced with police lights, continues a couple blocks home to hide in the bathroom. More charged are the words of caution in earlier cases, which remind that ordinary, law-abiding citizens may have sound reason to flee in the face of police activity because they fear trouble or violence. Indeed, as the Massachusetts Supreme Judicial Court recently recognized, Black men in particular, well aware of the racial inequities in policing, may have particular reasons to avoid or run from the police.[32]

No thoughtful observer need be naïve. Police may have reason to believe people fleeing from what seem like small crimes may create the urgency that requires police to follow them into their homes. But even when faced with more pressing and dangerous situations in the past, including authorization for no-knock warrants in narcotics busts, the Supreme Court has prohibited categorically authorizing police power.[33]

So too, the Court here rightfully rejected an unfettered license for police to chase any teenager playing music too loud through streets, hedges, and into their home, to enforce a law no matter how minor the infraction. Such headlong chases too often turn minor incidents into adrenaline-fueled situations, where the slightest misunderstandings result in fatal police violence. One hardly needs a litany to recall the number of nationally searing police killings that resulted from the enforcement of minor infractions: from Walter Scott's murder over a non-functioning taillight to Eric Garner's killing over the sale of loose cigarettes.[34] As the Supreme Court realized decades ago, capturing lawbreakers is an important civic project but not at any cost.[35] Even if *Lange* did not frame a situation as serious as police use of deadly force, these cases remind us both that deadly force in police chases is an ever-present danger and that not every minor infraction must be pursued no matter the cost.

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[32] Commonwealth v. Jimmy Warren, 58 N.E.3d 333, 342–43 (Mass. 2016).
[33] Richards v. Wisconsin, 520 U.S. 385, 393 n.3 (1997) (refusing to adopt a categorical rule).
[34] *George Floyd: Timeline of Black Deaths and Protests*, BBC News (Apr. 22, 2021).
[35] Tennessee v. Garner, 471 U.S. 1 (1985) (holding that a Tennessee statute authorizing the use of deadly force against an unarmed, non-dangerous fleeing suspect is unconstitutional).

III. *Torres v. Madrid*: Is an Unsuccessful Seizure Still a Seizure?

If unglamorous *Lange* is most likely to affect daily lives across the country, it is *Torres v. Madrid* that reminds of the cases of police violence that stop the nation in its tracks.[36] *Torres* presents another painful story of police officers, claims of mortal danger, and a hail of bullets hitting an unsuspecting victim. Like so many highly visible police shootings over the past years, the case is ultimately about a citizen accusing the police of using unjustified deadly violence, seeking accountability and compensation as against police insistence that their actions were justified. Though *Torres* lacks nationwide recognition because it is unaccompanied by the now-too-common searing video, the Court surely could not consider the case without being caught in the shadow of too many well-known deaths at the hands of police and nationwide protests demanding greater scrutiny of police violence.

On a mid-July morning in 2014, four New Mexico State Police officers arrived at an Albuquerque apartment complex to serve an arrest warrant on a female, white-collar suspect also suspected of drug trafficking and murder. According to the plaintiff, Roxanne Torres, and hotly contested by police defendants Janice Madrid and Richard Williamson, the officers spotted Torres speaking to a companion and understood she was not the target of the warrant. Torres's companion left and she, at the time suffering from drug-withdrawal symptoms, got into her car to do the same. As the officers approached her, Torres testified that she did not see their clothing identifying them as police but only noticed their guns. Fearing the worst, she fled a potential carjacking.

Despite not being in the way of her vehicle, the officers reacted by opening fire on Torres, firing thirteen bullets, hitting her twice in the back and paralyzing her left arm. Torres managed to steer the car one-handed until she left the complex, asked a bystander to report an attempted carjacking, and then stole another car and drove over an hour to a hospital in a neighboring town. That hospital then airlifted her back to Albuquerque for medical treatment, where she was arrested the next day.[37]

After pleading guilty to a slew of crimes pertaining to assaulting the police and stealing the car, Torres turned around and sued the police

[36] Torres v. Madrid, 141 S. Ct. 989 (2021).
[37] *Id*. at 993–94

officers for using excessive force to "seize her," that is, for shooting her. Thus, in order to recover damages for sustaining gunshot wounds, Torres now had to prove that the shooting was unreasonable under the Fourth Amendment. One might think that question was hard enough, but the facts of the case focused the Supreme Court on an even more nuanced preliminary question. Given that Torres was shot as she fled the police, before Torres could prove the police opening fire was an unreasonable seizing by gunfire, the Court had to answer whether a suspect that escaped the hold of the police after being shot had been "seized" at all! That is, if Torres's successful (temporary) evasion, with two bullets in her back, meant she had not been seized, then there could be no claim for excessive force in seizing her.[38]

For readers unfamiliar with Fourth Amendment doctrine, there is something awkward, even off-putting about this Fourth Amendment language and logic. The text of the Fourth Amendment, written long before armed police were a regular civic feature, only secures people against unreasonable searches or seizures.[39] Thus, rather than simply discussing whether what the police did was right or necessary, Fourth Amendment doctrine forces us into describing police shootings as seizures and asks if the seizure was "reasonable." It is bad enough such language forces us to describe death in antiseptic language. It can feel like desecration to speak of Derek Chauvin or Timothy Loehmann as having illegally "seized" George Floyd or Tamir Rice. But in *Torres*, the Fourth Amendment language did not simply plague our language, it generated a perplexing legal issue where none would otherwise exist. Because we must determine if you were "seized," our natural focus is shifted from the morality of the police opening fire or the broader ethical culture of our police departments to the odd question of whether Fourth Amendment rights are violated if one manages to crawl or drive away.

[38] *Id*. at 994.

[39] U.S. Const. amend IV (protecting the "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"). Actually, the text indicates that the right against unreasonable searches and seizures shall not be violated and no warrant shall issue without probable cause. Please do not ask me about the relationship between the reasonableness requirement and the warrant requirement in the Fourth Amendment. I'm begging you. We will be here all night. It is . . . shall we say, controversial.

The Supreme Court has trod this ground before. Indeed, the majority opinion asserted that Torres was largely decided by earlier precedent in *California v. Hodari D.*[40] As mentioned earlier, *Hodari D*. involved police officers converging on a suspected drug-trafficking area, sending young men running. As officers gave chase, one suspect, Hodari D., threw a small rock out of his hand, which turned out to be crack cocaine. Hodari D. argued the drugs should be suppressed because at the time the chase began, the police lacked probable cause to seize him. If the police assertion of authority were considered an arrest, then *Hodari D.* was unlawfully seized when the police yelled "Stop!" and gave chase. The Supreme Court, in an opinion penned by conservative icon Justice Antonin Scalia, rejected the argument. Rather, the *Hodari D.* Court insisted that seizure did not occur until the police applied physical force to bring a person or thing under their control. A seizure occurred when the police applied physical force or the suspect submitted to police authority. Thus, Hodari D. was not seized, the Court concluded, until he was tackled.[41]

Applying that logic to the facts of *Torres*, the majority insists, made for an easy ruling. One is seized in a single moment, the Court opined, even if the seizure is not permanent and one escapes. That single moment is when force is applied. Thus, Torres was seized the moment she was shot. Distilled into a holding, the Court held that the use of force with the intent to restrain constituted a seizure. Further, the majority stressed the importance of a bright-line rule to govern police officers in the field.[42]

Though the *Torres* majority confidently asserted the case was neatly resolved by precedent, as lawyers are keenly aware, precedent is only as valuable as the next Supreme Court decides. Thus, the majority insisted on supporting the ruling on independent grounds as well. Specifically, the majority marshalled broad historical examples illustrating that at the founding, an official's application of force, even if just a touch, which revealed an intent to seize was considered an arrest. The Court recalled historical examples of officials reaching into windows and executing arrests with a touch. In the most quizzical or charming example,

[40] California v. Hodari D., 499 U.S. 621 (1991).
[41] *Id*. at 622–26
[42] *Torres*, 141 S. Ct. at 1002–03 (citing *Hodari D.*, 399 U.S. at 626).

depending on one's taste, a "serjeant-at-mace" executed an arrest of an English noblewoman by theatrically touching her with a mace and proclaiming, "we arrest you, madam."[43]

Such genteel considerations are a far cry from having two bullets rip into your back; a conversation focused on antique methods of arresting noblewomen would border on obscene if it were not necessitated by the originalist preoccupation of much of the current Court. A detour through the debate about the persuasiveness of originalism would derail our review. But what is clear is that originalism, the view that what the writers of the Constitution wrote or referenced in their legal concepts fixes a special meaning on our modern-day constitutional rights, holds sway over much of a (conservative) wing of this Court. By grounding their reading in colonial-era understandings of arrest and highlighting that their decision fit with *Hodari D.*, penned by originalist icon Justice Scalia, the majority offered a sort of jurisprudential olive branch to skeptical originalists.

The dissent was having none of it. A blistering dissent, written by Justice Neil Gorsuch, entirely rejects the majority's originalist interpretation, pointing out that the cases cited were largely from obscure colonial debt-collection practices. Because debt collectors could not enter a home unless they first laid hands on their quarry, there was apparently a strange practice of hiding about windows to touch someone in order to then storm their home. Accusing the majority of wandering through legal fields and history to cobble together a "pastiche" justification, the dissent rejects this peculiar colonial game of debt-collector tag as an analogy to modern police practices.[44] The dissent argued simply that if a suspect is not brought under police control, it is impossible to find that they have been seized.[45]

To what end would the majority engage in this accused chicanery? For that matter, why engage in this rather peculiar debate about whether Torres was unlawfully seized, by the lights of colonial administrators, in the first place? Surely, police shooting and hitting someone who subsequently escapes is not so common as to plague our jurisprudence?

[43] *Id*. at 995–98 (quoting Countess of Rutland's Case, 77 Eng. Rep. 332, 336 (Star Chamber 1605)).
[44] *Id*. at 1010–11, 14 (Gorsuch, J., dissenting).
[45] *Id*. at 1015–17.

The dissent's clearly stated accusation reminds us of what is really at stake and its centrality in contemporary conversations around policing. Remember that determining whether Torres was unreasonably seized was critical in determining whether she may sue the police for using unreasonable force. Ultimately, the Court's stunted language framed a much simpler and more charged political conversation. How difficult will courts make it to even attempt to hold police accountable in cases of excessive or near fatal uses of force?

Keep in mind that the question does not assume the answer. Skepticism aside, I do not pretend to know if the officers were justified in firing on Torres. And as the dissent harshly notes, for Torres to recover in a federal lawsuit under § 1983 or the Fourteenth Amendment, she must still clear the disturbingly high "shocks the conscience" standard.[46] Additionally, the now infamous qualified immunity doctrine bars recovery for much police misconduct that falls short of that line. But on the dissent's Fourth Amendment view, one would not even have the opportunity to ask the question. While the majority rebuffs the suggestion that they are driven by secondary consequences in defining "seizure,"[47] for Torres, the conclusion is critical.

So, this peculiar conversation about whether one is seized by bullets that do not kill you is a proxy battle for whether citizens can even call the police to account in such peculiar situations. It invites us to inspect how we collectively respond to police shooting in their myriad incarnations. If this circumstance is unlikely to repeat itself often, our response says much about our default legal instincts in restraining police force and demanding accountability. If our first instinct is to adopt readings of the Fourth Amendment that shelter police not from ultimate liability but from even being inspected, then it is impossible to place faith in the Supreme Court as an avenue of legal progress on police reform. Protests in the street are not primarily aimed at the Supreme Court. But surely the weight of our national police reckoning mattered. In the midst of generational protests focused on the intersection of police force and race, a ruling that ignored police bullets because Torres *did not die* would have been unbearable.

[46] *Id*. at 1004.
[47] *Id*. at 1003–04 (majority opinion).

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What then to make of this trio of policing cases? Do they gesture at any sweeping movements in Fourth Amendment law? Even more politically, do they offer any reform agenda at the Supreme Court level for those committed to more just, less deadly, and less racist policing across the country?

I doubt it. But then, I doubt such a thing was possible. Remember we began with the reminder that the Supreme Court is a poor place to look for systemic changes of policing, the quintessential local governing power. Barring a once-in-several-generations makeover, such as the Warren Court, the Supreme Court can do little more than set national minimal standards through its Fourth Amendment interpretation. That is not to say such changes cannot be important. Cutting back on the staggering deference we pay to extraordinarily aggressive policing liberties would have real practical effects. As might paring back on qualified immunity doctrines. Moreover, the symbolic effect of such signals from the Supreme Court would send ripples across the country. But the most promising changes to policing will always be fought within the corners of state constitutions, state capitals, and city halls. Successful change will require the support of reform-minded police chiefs, mayors, city councilors, state legislators, and governors in opposition to leaders who would maintain the status quo.

Still, a progressive optimist might find hope in these three cases. The cases do not speak with a singular voice restraining police power. But even those of us with progressive commitments understand that no collection of nine oracles could sensibly be charged with setting police policies across the nation. What the cases do, however, is reverberate some of the most important notes surrounding policing today.

Cooley empowers a vulnerable minority community to police its boundaries and rejects the idea that privileged non-Indians can behave with impunity while traveling through reservation lands.

Lange curbs police power to chase people through backyards and into their homes to enforce the law no matter how minor the legal infraction. The Court's language in that case seemingly accepts that the circumstances where police chase someone for a misdemeanor without other signs of exigency will be rare. I rather wonder. For many communities where the enforcement of misdemeanors blurs with the

imposition of social control, limits on enforcement powers will be welcome. And for some within those communities and too many outside of them who view policing as the most-ready mechanism of social control, *Lange* may be a reminder that we cannot police our way out of every minor social problem.

Lastly, shootings as extraordinary as *Torres* may not occur every day, but our nation has seen enough of them to weigh on our collective souls. Particularly, for people of color, the steady rhythm of videos displaying callous murder after murder of unarmed people of color has become an undoing experience. If nothing else, *Torres* holds that such a shooting cannot be simply ignored, that victims may at least begin the laborious process of seeking accountability, and that the argument that there is no Fourth Amendment violation because one survived a volley of uncalled-for police bullets is beyond the constitutional pale.